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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JULIAN RICARDO CHACON,

Defendant.

2:08-CR-0059 JCM (GWF)

ORDER

Presently before the court is defendant Julian Chacon's motion to vacate pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel (doc. #78), ex parte motion for appointment of counsel (doc. #79), and application to proceed in forma pauperis (doc. #80).

On September 24, 2009, defendant Chacon was sentenced to 92 months in custody for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). (Doc. #61). On September 25, 2009, defendant filed a notice of appeal (doc. # 62), appealing the denial of a motion to suppress evidence. In his appeal, defendant argued that the court committed clear error when it found his consent to search to be voluntary. The Ninth Circuit Court of Appeals affirmed this court's ruling, holding that "the fact that Chacon was in custody at the time he gave consent did not taint his consent," and that this court had not committed clear error in concluding that the consent was voluntary. (Doc. #73).

Motion To Vacate

In the present motion to vacate under § 2255 (doc. #78), defendant Chacon asserts two claims for ineffective assistance of counsel. In his first claim, he asserts that after the Ninth Circuit affirmed

1 his judgment, he “sent [appellate] counsel written instructions to petition [his] appeal for further
2 review which he neglected to do, violating [his] due process rights.” *Id.* Further, he asserts that
3 appellate “[c]ounsel failed to argue...illegal search and seizure, [and] instead he argued [that his]
4 consent was involuntary, which is not the case.” Additionally, defendant contends that trial counsel
5 failed to “investigate and develop available evidence,” and that he was “coerced by counsel to take
6 the plea agreement.” (Doc. #78).

7 In his second claim, defendant asserts that appellate “counsel argued an inappropriate
8 appeal.” *Id.* Specifically, defendant asserts that on appeal counsel argued that his consent was
9 involuntary and tainted, rather than what he purports happened, which is that he *never* gave consent
10 *at all*. Defendant asserts that appellate counsel’s failure to argue appropriately caused the Ninth
11 Circuit to affirm this court’s ruling.

12 Pursuant to 28 U.S.C. § 2255, a person in custody under a judgment by a district court may
13 file a motion under this section if he seeks a determination that (1) the judgment violates the
14 Constitution or laws of the United States, (2) the court lacked jurisdiction to enter the judgment, (3)
15 the sentence exceeded the maximum allowed by law, or (4) the judgment or sentence is otherwise
16 subject to collateral review. Further, section (4)(b) states that “if the motion is not dismissed, the
17 judge must order the United States attorney to file an answer, motion, or other response within a
18 fixed time.” 28 U.S.C. § 2255(4)(b).

19 Here, defendant is asserting one of the most common cognizable claims under section 2255,
20 ineffective assistance of counsel. *See Baumann v. United States*, 692 F.2d 565, 581 (9th Cir. 1982).
21 Claims such as these “may be brought in a collateral proceeding under § 2255, whether or not the
22 petitioner could have raised them on direct appeal.” *Massaro v. United States*, 538 U.S. 500, 504,
23 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). However, pursuant to § 2255(4)(b), the court should
24 dismiss a 2255 motion if the “motion and files and records of the case conclusively show that the
25 prisoner is entitled to no relief.” 28 U.S.C. § 2255(4)(b).

26 Here, defendant’s second claim is premised upon the assertion that appellate counsel argued
27 the wrong appeal– involuntary consent rather than no consent at all. Upon this court’s review of the
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1 files, records, and transcripts in the case, it is clear that the defendant is not entitled to relief on this
 2 ground. Specifically, with regards to consent, the district court, who had the ability to weigh the
 3 evidence presented before it, conclusively determined that the officers' testimony was credible and
 4 that the consent occurred. (Docs. #38 and #45). Arguing on appeal that the consent was involuntary
 5 rather than no consent was given at all, would not affect the outcome of the appeal. Thus, the
 6 defendant's second claim is dismissed.

7 Defendant's first claim regarding appellate counsel's violation of his due process rights and
 8 trial counsel's failure to investigate evidence and coercing of a guilty plea survives, and the United
 9 States attorney is to file an answer and/or motion in response to the motion (doc. #78).

10 **Motion To Proceed In Forma Pauperis**

11 Defendant Chacon filed an application to proceed *in forma pauperis* (doc. #80), claiming that
 12 he is unable to pay fees associated with this proceeding because of his poverty. He contends that he
 13 is not currently employed, has not received money of any kind in the last twelve months, does not
 14 own real estate, stocks, or bonds, does not receive income from disability or the like, and that he has
 15 not placed any property, assets, or money in the name of anyone else in the last two years. (Doc.
 16 #80). Additionally, his financial certificate and attached inmate statement reflect that his current
 17 account balance is \$0.29, and that his average monthly balance is \$9.00. *Id.* In light of his financial
 18 circumstances, the court is inclined to grant the application to proceed *in forma pauperis*.

19 **Motion For Appointment of Counsel**

20 Under 18 U.S.C. § 3006A(2)(B), "[w]henver the United States magistrate or the court
 21 determines that the interests of justice so require, representation may be provided for any financially
 22 eligible person who" is seeking "relief under section...2255 of title 28." *Brown v. United States*, 623
 23 F.2d 54, 61 (9th Cir. 1980) held that the court must appoint counsel where the complexities of the
 24 case are such that denial of counsel would amount to a denial of due process. Further, appointment
 25 of counsel is warranted when the petitioner is a person of such limited education as to be incapable
 26 of presenting his claims in such a way that the court can afford him a fair hearing. *See Hawkins v.*
 27 *Bennet*, 423 F.2d 948 (8th Cir. 1970).

1 Here, defendant Chacon asserts that the issues are complex and that he is unable to
2 adequately present the claims himself. (Doc. #79). Upon a review of his motion to vacate (doc. #78)
3 under 28 U.S.C. § 2255, the court finds that in the interest of justice, appointing counsel is necessary
4 to “afford him a fair hearing.”

5 Accordingly,

6 IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendant Julian Chacon’s
7 second claim for ineffective assistance of counsel be, and the same hereby is, DISMISSED.

8 IT IS THEREFORE ORDERED that the government file an answer, motion, or other
9 response to defendant Julian Chacon’s first claim of his motion to vacate pursuant to 28 U.S.C. §
10 2255 for ineffective assistance of counsel (doc. #78) within thirty (30) days from the date of this
11 order.

12 IT IS FURTHER ORDERED that defendant Julian Chacon’s ex parte motion for
13 appointment of counsel (doc. #79) be, and the same hereby is GRANTED.

14 IT IS FURTHER ORDERED that defendant’s application to proceed in forma pauperis (doc.
15 #80) be, and the same hereby is GRANTED.

16 DATED this 22nd day of June, 2011.

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19 UNITED STATES DISTRICT JUDGE